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ABSTRACT

Questions concerning the relative protection afforded by the speech and press clauses of the First Amendment to the United States Constitution, the law of libel, and protection for the editorial process are the focus of this paper. The first section summarizes arguments for First Amendment press protection, focusing on the question of whether there is a historical basis for making a distinction between the speech and press clauses of the First Amendment, as well as on approaches to the inherent difficulties in defining "press." The second section discusses implications of the 1974 Supreme Court decision in "Gertz v. Robert Welch, Inc.," in which the Supreme Court for the first time applied the constitutional libel defense established in "New York Times Co. v. Sullivan" to media defendants. It outlines problems with the media-defendant approach taken in the case and notes the reluctance of several state courts to extend the constitutional privilege to nonmedia defendants. In its third section, the paper outlines implications of the 1979 "Herbert v. Lando" case, in which the Supreme Court cast serious doubts on the scope of protection afforded the editorial function of the press. It explains the question posed in the case, discusses the Supreme Court's response, and suggests that a constitutional privilege for the press was not ruled out by the Supreme Court ruling. The paper concludes by observing that the issues involved in the ongoing speech-press debate have received little illumination from recent Supreme Court libel decisions. (GT)

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THE SPEECH-PRESS DEBATE, THE LAW OF LIBEL,
AND PROTECTION FOR THE EDITORIAL PROCESS

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THE SPEECH-PRESS DEBATE, THE LAW OF LIBEL
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In June of 1974 the Supreme Court in Gertz v. Robert Welch, Inc.,¹ for the first time explicitly applied the constitutional libel defense established ten years earlier in New York Times Co. v. Sullivan² to media defendants.³ In November of 1974 Justice Stewart, a member of the Gertz majority, in an address at Yale Law School, made the provocative argument that the free press clause of the first amendment, as a structural provision of the Constitution, affords the institutional press protection which goes beyond the speech clause guarantees. He concluded that "the publishing business is, in short, the only organized private business that is given explicit constitutional protection." He reasoned that:

This basic understanding is essential, I think, to avoid an elementary error of constitutional law. It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They are guaranteed that freedom to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy.⁴

Justice Stewart's structural approach to first amendment interpretation touched off a speech-press clause debate, both inside and outside the courtroom, which continues today. More than a dozen law review articles and commentaries, for example, have been published during the past five years on the pros and cons of the institutional press privilege claim.⁵ And in one area after another the Supreme Court, despite Justice Stewart's views, has shown a

reluctance to extend the press special first amendment protection which goes beyond that granted to the individual. During its 1977 Term, for example, the Court refused to open jail and prison doors to the media,⁶ refused to exempt newsrooms from surprise searches under valid warrant,⁷ rejected attempts to obtain the Nixon tapes for public distribution,⁸ upheld the FCC's proposed sanctions against communication of "indecent language" over the airwaves,⁹ and upheld FCC rules on cross-ownership of broadcast media by newspapers.¹⁰

And in a non-media case, First National Bank of Boston v. Bellotti,¹¹ decided during the same Term of Court, Chief Justice Burger went out of his way to assure the press that it had no special first amendment rights not accorded other corporations. Concurring in the majority's opinion which ruled unconstitutional a Massachusetts statute prohibiting corporate "issue" advertising, the Chief Justice wrote:

I perceive two fundamental difficulties with a narrow reading of the Press Clause. First, although certainty on this point is not possible, the history of the Clause does not suggest that the authors contemplated a "special" or "institutional" privilege. . . . The second fundamental difficulty with interpreting the Press Clause as conferring special status on a limited group is one of definition.¹²

"In short," the Chief Justice concluded, "the First Amendment does not 'belong' to any definable category of persons or entities: it belongs to all who exercise its freedoms."¹³

Previous Courts have likewise been reluctant to grant special first amendment privileges to the press. Freedom of press claims were more likely to be measured by a standard of what the general public would or could be granted under the same fact situation.

Journalists' claims for a first amendment based testimonial privilege to protect their confidential sources, for example, was rejected by the Court because of the obligation of all citizens to testify at grand jury hearings.¹⁴ Likewise, the right of the press to inspect judicial records¹⁵ and to attend judicial proceedings,¹⁶ have been tied by the Court to the right of the public to equal access.

Only in the public libel area, apparently, has the press been granted a substantial privilege which exceeds that afforded members of the public generally. At least in the Gertz opinion, which in effect constitutionalized the law of libel, the press seems to have been singled out for special protection under the Sullivan libel rule. But even here unanswered questions remain. Is the Supreme Court, for example, in light of its denial of special privileges for the institutional press in other areas, willing to limit the application of the constitutional libel privilege to media defendants? What are the implications of the ongoing speech-press clause debate for a free and autonomous press, particularly in regard to protection of the "uninhibited, robust, and wide-open" debate on public issues envisaged by the Court in Sullivan?¹⁷

Other more recent developments in the libel context raise additional questions about Justice Stewart's Yale Law School thesis in regard to the institutional press. During its 1978 Term, for example, the Court ruled in three libel cases, all with results favorable to the plaintiffs. In one of those cases, Herbert v. Lando,¹⁸ the Court cast serious doubts on the scope of protection afforded the editorial function of the press, i.e., media defendants

claiming the Sullivan defense against a public official or public figure. The Herbert Court held that neither the speech nor the press clause of the first amendment protects journalists from responding to questions during pre-trial discovery, even though the questions may deal with the journalist's "state of mind" or with "predecisional communications" between the journalist and his editor.¹⁹ The question remains: What are the implications of the Herbert holding in regard to the continued protection of the editorial processes? These and related questions concerning the speech-press debate, the law of libel, and protection for the editorial process will provide the focus of this paper.

I. ARGUMENTS FOR INSTITUTIONAL PRESS RIGHTS

Does the press clause afford the institutional press first amendment rights and privileges which go beyond the expression guarantees afforded to all citizens under the speech clause? While some cases during the 1970's may be read as suggesting that the press clause has no independent scope,²⁰ others tend to suggest just the opposite conclusion.²¹ Actually the Supreme Court, according to Chief Justice Burger, has "not yet squarely resolved" the question.²² The ongoing debate concerning the interrelatedness of the speech and press clauses resulting from Justice Stewart's Yale Law School address, however, continues unabated. While many aspects of the speech-press debate are beyond the scope of this study, a brief summary of the arguments for first amendment protection of an independent and autonomous press is necessary for an understanding of the implications of the question in the libel area.

One aspect of the debate turns on the question of whether or not there is an historical basis for making a distinction between the speech and press clauses. The Chief Justice, as noted above,²³ does not think the authors of the first amendment contemplated "a special or institutional privilege" for the press. Indeed, the Chief Justice found substantial authority for the proposition that the framers used freedom of speech and freedom of the press synonymously.²⁴ While some first amendment scholars agree with that assessment,²⁵ others see a clear historical precedent for an independent press clause.

Floyd Abrams, counsel for media defendants in Herbert v. Lando,²⁶ while acknowledging that ambiguities exist about the meaning of the press clause, has observed that:

Whatever other conclusions may be drawn--and disputes engaged in--from the history of the adoption of the press clause of the first amendment, one thing is clear: The press clause of the first amendment was no afterthought, no mere appendage to the speech clause. The press clause was not, the views of Chief Justice Burger to the contrary, merely "complementary to and a natural extension of Speech Clause liberty."²⁷

And Melville Nimmer, a professor of law, agreeing with Justice Stewart that if the speech clause is held to refer to all forms of expression, then the press clause would be a meaningless redundancy, concluded that "freedom of the press as a right recognizably distinct from that of freedom of speech is an idea whose time is past due."²⁸

The truth, as Zechariah Chafee, an eminent first amendment scholar, observed many years ago, may be that the framers of the first amendment had no very clear idea what they meant.²⁹ In any case, the original understanding of the framers, as Professor

Nimmer has noted, is not necessarily controlling. It is what the framers wrote, not what they meant, that in the last analysis should be determinative.³⁰ And as another first amendment scholar has observed, even though it may be unlikely that the press clause could have been designed to protect the institutional press alone, as suggested by Justice Stewart, "the conceptual unity of speech and press evident in colonial times is less easily defended today."³¹ There is little doubt, for example, that the soapbox orator, the politician, the evangelist, or the civil rights activist faces a far more complex problem today in disseminating his or her message than was true of similar activities in Colonial America. Use of the mass media is virtually indispensable today in the conduct of a successful information campaign.

The Chief Justice's second problem with affording the press special privileges not granted to non-media litigants--the difficulty inherent in defining "press"--does not appear to be insurmountable. Three general approaches have been suggested by one legal scholar.³²

First, the press may be defined in respect to its historic connotation affording an equivalent protection under the press clause for all who write, including the lonely pamphleteer and the occasional newsletter publisher. This broad definitional approach has been supported by the Court, at least in dicta.³³

Secondly, the press may be defined more narrowly along functional lines. Congress faces such a task as legislators attempt to draft a bill seeking to overturn the Supreme Court's Zurcher v. The Stanford Daily decision³⁴ which authorized the warranted search

of newsrooms. Among several federal bills under consideration are two Carter administration proposals which would afford protection not only to journalists employed on established newspapers but also "to free-lance writers, radio and television stations, magazines, academicians and any other person possessing materials in connection with the dissemination to the public of a newspaper, book, broadcast or other form of communication."³⁵

Thirdly, the press may be defined, as Justice Stewart would apparently define it, to include only the established "institutional press." Twenty-six states with shield laws protecting journalists from disclosing confidential sources and, in some instances, information usually take such a limited definitional approach.³⁶ Though protection under these state shield laws have been judicially gutted with regularity, as one commentator has noted, it rarely has occurred because of a lack of knowledge about who or what was intended to be protected.³⁷

The first definitional approach, while attenuating the speech-press problem, may be too broad in that it tends to ignore the important function of the traditional press as an institution. The third approach, though it coincides with Justice Stewart's definition, may be too narrow in that it denies press privileges to some who may regularly perform important press functions. The second approach, therefore, though not flawless, may afford the best compromise.³⁸

In any case, an important implication of the speech-press debate is that the first amendment need not be read to grant special rights only to those engaged in institutionalized communication.

One writer argues that:

What it should protect is not the institution, but the role of the press: To afford a vehicle of information and opinion, to inform and educate the public, to offer criticism, to provide a forum for discussion and debate, and to act as a surrogate to obtain for readers news and information that individual citizens could not or would not gather on their own. A special guarantee for freedom of the press should apply not simply to those whom a court might label "press" but to whomever, of whatever size, by whatever means, regularly undertakes to fulfill the press function.³⁹

If the Supreme Court has never "squarely resolved" the institutional press question arising from Justice Stewart's Yale Law School address, as noted by Chief Justice Burger, the Court has not failed to acknowledge the unique role played by the institutional press. Justice Black observed in the Pentagon Papers case, for example, that "[i]n the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy."⁴⁰ Even the Chief Justice has been more supportive of the role of an autonomous press free to make editorial decisions without governmental interference than has been generally recognized.⁴¹ Indeed, there has been no lack of judicial recognition of and support for the so-called "societal function" of the press.⁴²

II. THE IMPLICATIONS OF GERTZ

Despite the fact that the Supreme Court has been reluctant to grant the institutional press special privileges in many other areas, as noted above,⁴³ the libel question remains: Does Gertz v. Robert Welch, Inc.,⁴⁴ limit the Sullivan libel rule to actions involving media defendants? Justice Powell, writing for the Gertz majority,⁴⁵ focused on media terms such as "newspaper," "news media," "publisher(s)," and "broadcaster(s)" in his opinion.⁴⁶ Such media

terms also appear in the opinions of at least two other justices in Gertz. Justice Blackmun, concurring, made reference to "media liability";⁴⁷ the Chief Justice, dissenting, wrote that the Court's holding applied to "media defendants."⁴⁸ Only Justice White, dissenting, assumed that the Gertz holding applied to both media and non-media defendants.⁴⁹

A. Problem With Media-Defendant Approach

It would seem fair to conclude, based upon the language of the various Gertz opinions, that the Court has formulated a libel doctrine applicable only to defamatory statements published by media defendants, for example, newspapers and broadcasters. However, Melville B. Nimmer, a professor of law, finds that such an interpretation by the Gertz Court "leaves untouched a significant area of defamation involving written and spoken statements not uttered via the media."⁵⁰ Reinforcing Justice White's dissent, Professor Nimmer notes that:

[O]ne is left with the uneasy feeling that the Court's application of the new doctrine to what may be regarded as the freedom of the press arena, and its unarticulated exclusion of other "speech" may have been inadvertent, and that, further, the inadvertence was due precisely to the failure of the Court to recognize that freedoms of speech and press are not necessarily coextensive.⁵¹

If the Court meant the Gertz holding to apply only to the media, another writer has noted, the result is difficult to justify without reference to separate constitutional guarantees for speech and for the press,⁵² a step which the Court to date has been reluctant to take in other areas of communications law.

The history of the constitutional libel privilege from Sullivan to Gertz, surprisingly, gives little indication that the "actual

malice" rule of Sullivan was intended to be applied exclusively to media defendants. While the principal defendant in Sullivan was a newspaper, four individual defendants, all Alabama Negro clergymen, were also named. It is therefore understandable that Justice Brennan's opinion spoke of the need for "breathing space" to protect "freedom of expression" rather than freedom of the press alone.⁵³ Indeed, the Court's majority opinion emphasized the need to protect an "uninhibited, robust and wide-open" debate on public issues⁵⁴ without regard to whether the communication originated with a media or non-media source. While Justice Brennan made specific reference to newspapers⁵⁵ and to the press,⁵⁶ the primary focus of the opinion was, without doubt, on the free speech rights of the citizen-critic.⁵⁷

Another problem with the media-defendant approach taken by Justice Powell in Gertz is that the Court had previously applied the Sullivan rule to non-media as well as to media defendants during the intervening years. In Garrison v. Louisiana,⁵⁸ St. Amant v. Thompson,⁵⁹ and Pickering v. Board of Education,⁶⁰ for example, the Court had applied the Sullivan rule to non-media defendants without adverse comment by any of the justices. While it is true that each of the non-media defendants in these cases used the media to disseminate his message, there is no suggestion by the Court that this was a factor in applying the constitutional libel privilege.

In two of the three post-Gertz libel cases to be heard by the Supreme Court, Time, Inc. v. Firestone⁶¹ and Wolston v. Reader's Digest Ass'n,⁶² the press question was not raised because media defendants were involved. But in a third post-Gertz libel case,

Hutchinson v. Proxmire,⁶³ the Court had the opportunity to answer the press question raised by Gertz since the publication resulting in the libel action was made by a United States Senator. But Chief Justice Burger, writing for the majority, ruled that since the Court had found that the plaintiff, the recipient of a government research grant, was not a public figure, it was unnecessary to deal with the non-media defendant question.⁶⁴ In the five years since Gertz, the lower courts, left without further guidance, have variously interpreted the scope of the Gertz holding in regard to non-media defendants.

B. Interpretation by the States

In numerous libel actions several state appellate courts have indicated a reluctance to extend the constitutional privilege to non-media defendants. The Wisconsin Supreme Court, for example, in limiting the constitutional privilege to media defendants, contended that implicit in Sullivan and its progeny is a "focus on the media and the 'matter of public concern' which . . . is the key to the distinction in defamation law."⁶⁵ State courts have likewise ruled that the privilege does not apply to credit reporting agencies,⁶⁶ nor to libel actions between private parties,⁶⁷ or where the publication concerns a private matter.⁶⁸ Other state courts, in cases focusing on the negligence standard formulated on the basis of Gertz, have limited use of the new fault standard to actions brought by private individuals against media defendants.⁶⁹ Still other state courts have merely questioned the need to extend the libel privilege to non-media defendants.⁷⁰

Many state courts and lower federal courts, on the other hand, have applied the Sullivan-Gertz libel privilege to media and non-media defendants alike.⁷¹ In some instances the courts, while acknowledging that Gertz was specifically applied to media defendants, held that this did not necessarily preclude use of the privilege by non-media defendants.⁷² And, despite the Gertz opinion, at least one state has found no rational basis for limiting the Sullivan rule. Following that reasoning Maryland applied the rule to media and non-media defendants and to both libel and slander actions.⁷³ In making the Sullivan-Gertz rule applicable to both media and non-media defendants, the state courts are giving at least implicit recognition to Chief Justice Burger's interpretation of the ongoing speech-press clause issue.⁷⁴

Until the Supreme Court rules specifically to extend Gertz to non-media defendants, state courts will no doubt continue to follow two lines of authority. And, if some states continue to read Gertz as limiting the Sullivan rule to media defendants, as seemed to be the intention of Justice Powell, non-media defendants may be faced with liability determined by a lesser standard of fault in an action brought by a private individual than would a media defendant. It has been suggested that neither policy nor reason require such a result.⁷⁵ On the other hand, if the Sullivan rule is applied to both media and non-media defendants, one of the last remaining privileges accorded the press as an institution will disappear. In this regard, a variation on the theme of special press protection has been suggested as an alternative.

Since the media libel defendant typically is reporting (press) the statement (speech) of other persons, it might be said that both

the speech and press guarantees are usually involved. But in the context of a libel or slander by a non-media defendant, an argument can be made that only protection under the speech clause is involved. While the joint protection of the two clauses might be sufficient to override even a strong state interest in protecting reputation, it may be argued that the free speech clause alone would be insufficient to do so.⁷⁶ The Sullivan libel defense, however, is not without its burdens, particularly for media defendants. This was vividly demonstrated in a controversial 1979 case dealing with pre-trial discovery in a \$40-million libel action brought by a public figure against broadcast defendants and a magazine, to be discussed below.

III. THE IMPLICATIONS OF HERBERT

Despite the media focus of Gertz in 1974, five years later in Herbert v. Lando⁷⁷ the Supreme Court again rejected the opportunity to accord the news media a special institutional privilege under the free press clause, even though the case involved a Sullivan-rule libel question.

The defamation action in Herbert resulted from a CBS broadcast in 1973 entitled "The Selling of Colonel Herbert," a segment of CBS's award-winning "60 Minutes" program which had been critical of the plaintiff. Colonel Herbert, a retired Army officer who had extended war-time service in Vietnam and who had received widespread media attention in 1969-1970 when he accused his superior officers of covering up reports of atrocities and other war crimes, brought a \$44 million-plus libel action against CBS, Barry Lando, producer and editor of the program, Mike Wallace, the narrator, and Atlantic

Monthly magazine, which had published an article on the same subject prepared by Lando. In his complaint, Herbert alleged that the program and article falsely and maliciously portrayed him as a liar and a person who had made war-crimes charges to explain his relief from command. He requested what the Court called "substantial damages" for injury to his reputation and to the literary value of a book he had just published recounting his experiences.⁷⁸

A. The Question Posed in Herbert

The issue posed by Herbert was deceptively simple: Does a journalist in a Sullivan-rule libel case have a first amendment right to refuse to answer pre-trial discovery questions directed toward the exercise of judgment in the editorial process?⁷⁹ The District Court's answer was that a public figure libel plaintiff is entitled to a "liberal interpretation" of the rule concerning pre-trial discovery.⁸⁰ In reference to pre-trial discovery, the Federal Rules of Civil Procedure state that:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.⁸¹

On interlocutory appeal, the Second Circuit, noting that the seemingly narrow issue before the court had broad implications in terms of first amendment protection afforded the editorial process against compelled disclosure, reversed the District Court.⁸² Chief Judge Kaufman, expressing the view that the Supreme Court in such cases as Miami Herald Publishing Co. v. Tornillo⁸³ and Columbia Broadcasting System v. Democratic National Committee⁸⁴ had granted

protection to the editorial function in unequivocal terms, concluded that:

If we were to allow selective disclosure of how a journalist formulated his judgments on what to print or not to print, we would be condoning judicial review of the editor's thought processes. Such an inquiry, which on its face would be virtually boundless, endangers a constitutionally protected realm, and unquestionably puts a freeze on the free interchange of ideas within the newsroom. A reporter or editor, aware that his thoughts might have to be justified in a court of law, would often be discouraged and dissuaded from the creative verbal testing, probing, and discussion of hypotheses and alternatives which are the sine qua non of responsible journalism.⁸⁵

Judge Oakes, concurring in Judge Kaufman's opinion, relied in part upon Justice Stewart's seminal speech at Yale Law School in arriving at the conclusion that the first amendment provided protection against compelled discovery of the editorial selection process.⁸⁶ On appeal, however, the Second Circuit's grant of a virtually absolute privilege for the editorial function of the press was reversed.

B. The Supreme Court's Response in Herbert

Justice White, writing for a six-member majority in Herbert, ruled that a journalist does not have an absolute first amendment privilege to refuse to testify during pre-trial discovery hearings in a suit by a public figure in regard to either "state of mind" questions involving the journalist's thought processes or in regard to "predecisional communications" between reporters and editors.⁸⁷ Justice White said that the Sullivan standard requiring public officials and public figures to prove knowing or reckless falsehood to collect damages provided an adequate balance between a libel plaintiff's reputational interest and the first amendment's guarantee of a free press.⁸⁸ And, since Sullivan and its progeny

made it necessary that a public figure inquire into the defendants' conduct and state of mind, denying him the right to pursue such questions in pre-trial discovery, would alter the balance of interests provided in Sullivan by substantially interfering with the plaintiff's ability to carry his burden of proof.⁸⁹

The Court's majority clearly assumed that compelling disclosure of the beliefs and conversations of editors and reporters would not unconstitutionally chill editorial decision making.⁹⁰ Responding to arguments of the media defendants that adoption of such liberal discovery rules would offer opportunity for harassment, abuse, and increased legal expenses, Justice White said that trial judges, applying existing discovery provisions, already have "ample powers" to curb discovery abuses by requiring relevance, by issuing protective orders, and by construing the rules to secure speedy and inexpensive determinations of defamation actions.⁹¹

Justice Brennan, dissenting in part, agreed with the majority in rejecting a privilege against inquiry into a reporter's mental processes, but he urged a qualified constitutional privilege to protect "predecisional communications" in the newsroom.⁹² Justice Marshall, dissenting, likewise agreed with the majority that individual "state of mind" inquiries were virtually mandated by the "actual malice" standard, but he argued for an absolute privilege against discovery of "the substance of editorial conversation."⁹³ Justice Stewart dissented because he did not think discovery questions concerning the editorial process were relevant in Sullivan-rule libel actions.⁹⁴

The most important opinion in Herbert, however, may be the concurrence of Justice Powell in which he attempted to clarify and

integrate the majority opinion of Justice White with the dissenting views of Justices Brennan, Marshall, and Stewart.⁹⁵ Justice Powell said: "I write to emphasize the additional point that, in supervising discovery in a libel suit by a public figure, a district court has a duty to consider First Amendment interests as well as the private interest of the plaintiffs."⁹⁶ He concluded that:

Whatever standard may be appropriate in other cases, when a discovery demand arguably impinges on First Amendment rights a district court should measure the degree of relevance required in light of both the private needs of the parties and the public concerns implicated. On the one hand, as this Court has repeatedly recognized, the solicitude for First Amendment rights evidenced in our opinions reflect concern for the important public interest in a free flow of news and commentary. . . . On the other hand, there also is a significant public interest in according to civil litigants discovery of such matters as may be genuinely relevant to their lawsuit.⁹⁷

Such a balancing-of-interests approach, though "hardly an exact science," is a proper function of judges, Justice Powell noted.⁹⁸

C. A Conditional Privilege for the Press?

In rejecting the absolute privilege against pre-trial discovery afforded the press under the first amendment by the Second Circuit, has the Supreme Court in Herbert ruled out even a conditional privilege for the press? The answer seems to be a qualified "no." It is arguable, at least, that the Herbert majority's rejection of an absolute editorial process privilege does not oblige trial judges to condone unjustified intrusions into editorial communications, particularly in regard to predecisional newsroom conversations.⁹⁹ And although the Herbert majority did not accept Justice Brennan's proposed compromise,¹⁰⁰ Justice White was careful to limit his opinion, pointing out that:

This is not to say that the editorial discussions or exchanges have no constitutional protection from casual inquiry. There is no law that subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest; and if there were, it would not survive constitutional scrutiny as the First Amendment is presently construed.¹⁰¹

Justice White's opinion suggests that while the majority of the Court rejected an absolute editorial privilege for the press, it did not explicitly reject a qualified privilege. That also seems to be the position taken by Justice Powell in concurring, beginning his opinion with the statement: "I do not see my observations as being inconsistent with the Court's opinion."¹⁰² It should also be remembered that two of the dissenters, Justices Brennan and Marshall, would grant a conditional privilege against discovery into the editorial process, particularly predecisional newsroom conversations, and that Justice Stewart would rule out pre-trial discovery altogether in Sullivan-rule libel cases, arguing that such questioning is irrelevant.

The Herbert decision, though only one in a series of recent Supreme Court opinions unfavorable to the media, brought what one justice called a "firestorm of acrimonious criticism" from the press.¹⁰³ The press generally viewed the decision as threatening the "uninhibited, robust, and wide-open" debate on public issues espoused by the Court in setting out the Sullivan rule. That threat, as perceived by the press, came both as a result of the unprecedented scope of discovery afforded Herbert even before the defendants declined to answer specific questions designed to probe the editorial judgmental process¹⁰⁴ and fear that the Herbert Court was in fact altering the scope of the Sullivan rule itself.¹⁰⁵

Indeed, Herbert's authorization for direct inquiry into the editorial process by libel plaintiffs may increase media defense costs significantly, thereby chilling the exercise of the editorial process and encouraging further self-censorship.¹⁰⁶

It is clear that while the various courts considering Herbert may have been asked to answer a relatively straightforward question, Does a journalist in a Sullivan-rule libel case have a first amendment right to refuse to answer pre-trial discovery questions directed toward the exercise of editorial judgment, the plethora of opinions issued by the various judges¹⁰⁷ suggest that the pre-trial discovery question in such a context is far more complex than it first appeared.

V. CONCLUSIONS

The issues involved in the ongoing debate over the relative protection afforded by the speech and press clauses of the first amendment have received scant illumination from the Supreme Court's recent libel decisions. While Justice Powell's majority opinion in Gertz seemed to limit the Sullivan rule to media defendants, state courts have variously applied Gertz in regard to private libel plaintiffs. Some have read Gertz, for example, as applicable to only media defendants; some have applied the Sullivan rule, despite Gertz, to media and non-media defendants alike; some have limited the scope of Sullivan-rule cases in terms of who brings the libel action or in reference to the nature of the publication resulting in the action.

The Sullivan rule, it should be noted, was applied to both media and non-media defendants prior to Justice Powell's Gertz

decision. In such cases, for example, as Garrison, St. Amant, and Pickering the crucial link seemed to be that the non-media defendants used the media for the communication of their messages. But more often than not the press has been the benefactor of the "actual malice" privilege simply because the media are most involved in the publication of potentially libelous statements about public persons. In other words, it has mattered little whether or not the Sullivan rule was meant to be limited to media defendants since it is the media which ultimately become the target in most public libel actions.

The Gertz opinion in June of 1974, however, followed five months later by Justice Stewart's Yale Law School address, prompted a lively national debate, both inside and outside the courtroom, over the relative merits of special first amendment protection for the institutional press. Chief Justice Burger recently expressed the view that the Court has never squarely resolved the speech-press protection issue, this despite his dissent in Gertz acknowledging that Justice Powell's majority opinion limited the Sullivan rule to media defendants, at least in actions brought by private persons. In post-Gertz cases the Court has been consistently reluctant, particularly outside the libel area, to provide the press special constitutional privileges. In regard to access to jails and the courtroom, for example, the Court has refused the media access beyond that provided the general public. The press has also been denied a constitutional privilege allowing protection of confidential sources and safeguards against surprise warranted searches of newsrooms.

The ambiguity of the judicial stance toward the question of a special first amendment libel privilege for the institutional press

is also reflected in the Court's more recent Herbert decision involving pre-trial discovery. While the narrow scope of the majority's holding, plus Justice Powell's concurring opinion, may still allow the press to seek a conditional privilege in civil discovery cases involving libel, the Herbert opinion may foreshadow future problems for the press. While the decision requiring a liberal interpretation of the Federal Rules of Civil Procedure in regard to discovery may not cause such media giants as CBS or the New York Times to engage in excessive self-censorship, as assumed by the Court, the scope of the discovery process as demonstrated by Herbert, and the extra expense likely to be incurred in successfully defending against future libel actions, may very well chill the editorial function of thousands of small daily and weekly newspapers and smaller broadcast stations throughout the United States. Floyd Abrams, counsel for the Herbert defendants, has cautioned, for example, that the Court's "ruling will be as applicable in libel actions by powerful public officials as it is to this plaintiff and as applicable to suits against small and easily threatened defendants as it is to these defendants."¹⁰⁸

And whether or not the Sullivan rule was meant to be limited to media defendants, the *raison d'etre* for the privilege remains-- the recognition of a national commitment to an "uninhibited, robust, and wide-open" debate on public issues. If Justice Stewart's claim of a special first amendment privilege for the institutional press goes too far, the role which the press assumes as a surrogate to obtain for readers and listeners information that individual citizens could not or would not gather on their own and in providing a forum

for discussion and debate of issues of public concern continues to need protection. Various interpretations of the Gertz holding by state courts in regard to the media issue indicates that the Supreme Court has been less than clear in its recent Sullivan rule pronouncements. And the continuing controversy surrounding the Herbert decision denying the press a privilege against pre-trial discovery seems to indicate that the speech-press clause debate is far from resolved.

Reference Notes

¹418 U.S. 323 (1974).

²376 U.S. 254 (1964).

³Justice Powell in Gertz wrote solely in terms of media defendants, for example, "whether a newspaper or broadcaster" is entitled to claim a constitutional privilege. 418 U.S. at 332. There were also references to publisher(s), broadcaster(s), as well as to the "news media." Id. at 341, 347, 350.

⁴Stewart, "Or of the Press," 26 HASTINGS L.J. 631, 633 (1975).

⁵See, e.g., Abrams, The Press IS Different: Reflections on Justice Stewart and the Autonomous Press, 7 HOFSTRA L. REV. 563 (1979); Bezanson, The New Free Press Guarantee, 63 VA. L. REV. 731 (1977); Blanchard, The Institutional Press and Its First Amendment Privileges, in SUPREME COURT REVIEW 1978 (P. Kurland & G. Casper, eds. 1979); Bork, The First Amendment Does Not Give Greater Freedom to the Press Than to Speech, 12 CENTER MAGAZINE 28 (March-April 1979); Comment, The Supreme Court and the Press: Freedom or Privilege? 12 AKRON L. REV. 261 (1978); Comment, Problem in Defining the Institutional Status of the Press, 11 U. RICH. L. REV. 177 (1976); Lange, The Speech and Press Clauses, 23 U.C.L.A. L. REV. 77 (1975); Lewis, A Preferred Position for Journalism? 7 HOFSTRA L. REV. 595 (1979); Nimmer, Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech? 26 HASTINGS L.J. (1975); Note, The Supreme Court and the Not-So-Privileged Press, 13 UNIV. RICH. L. REV. 313 (1979); Powe, Or of the [Broadcast] Press, 55 TEX. L. REV. 39 (1976); Sack, Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press, 7 HOFSTRA L. REV. 629 (1979); Van Alstyne, The Hazards to the Press of Claiming a "Preferred Position", 28 HASTINGS L.J. 761 (1977); Wharton, Freedom of Speech or of the Press: The Broadcaster as Citizen and Institution, 5 J. CONTEMP. L. 339 (1979).

⁶Houchins v. KQED, Inc., 438 U.S. 1 (1978).

⁷Zurcher v. The Stanford Daily, 436 U.S. 547 (1978).

⁸Nixon v. Warner Comm., Inc., 435 U.S. 589 (1978).

⁹F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978).

¹⁰F.C.C. v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978). For a discussion of the 1977 Term in regard to press privilege claims, see Blanchard, note 5 supra.

¹¹435 U.S. 765 (1978).

¹²435 U.S. at 798, 801 (Burger, C.J., concurring).

¹³Id. at 802 (Burger, C.J., concurring).

- ¹⁴*Branzburg v. Hayes*, 408 U.S. 665 (1972).
- ¹⁵*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).
- ¹⁶*Gannett Co. v. DePasquale*, 99 S.Ct. 2898 (1979).
- ¹⁷376 U.S. at 270.
- ¹⁸441 U.S. 153 (1979).
- ¹⁹*Id.* at 160, 173-74.
- ²⁰See, e.g., *Pell v. Procunier*, 417 U.S. 817, 834 (1974).
- ²¹See, e.g., *Bigelow v. Virginia*, 421 U.S. 809, 828 (1975).
- ²²*First Nat'l Bank v. Bellotti*, 435 U.S. at 798 n. 3 (Burger, C.J., concurring).
- ²³See text accompanying notes 11-13 supra.
- ²⁴*First Nat'l Bank v. Bellotti*, 435 U.S. at 789-801 (Burger, C.J., concurring).
- ²⁵*Lewis*, note 5 supra, at 597-600; *Lange*, note 5 supra, at 88-99. *Lange* concluded, however, "that the Framers have left us language in the first amendment which justifies the present debate-- language which, under almost any view one takes, is less than clear." *Id.* at 88.
- ²⁶441 U.S. 153.
- ²⁷*Abrams*, note 5 supra, at 579.
- ²⁸*Nimmer*, note 5 supra, at 658.
- ²⁹Chafee, review of A. Meiklejohn, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948), 62 HARV. L. REV. 891, 898 (1949). For a similar view, see Levy *LEGACY OF SUPPRESSION* xix, 247-48 (Torchbook ed. 1963).
- ³⁰*Nimmer*, note 5 supra, at 641.
- ³¹*Lange*, note 5 supra, at 99.
- ³²The definitional categories are adapted from *Abrams*, note 5 supra, at 581-83. *Abrams* argues that
- definitional difficulty is hardly a basis for affording no press clause protection at all. In a legal world in which lawyers make tolerably acceptable livings disputing what is and is not "unreasonable" restraint of trade or "unfair" competition, it is simply unacceptable to say that because a word

in the Constitution is difficult to define, it should be afforded no meaning at all.

Id. at 583.

³³See, e.g., *Branzburg v. Hayes*, 408 U.S. at 704-05, where the Court, quoting *Lovell v. Griffin*, 303 U.S. 444, 450 (1938), said:

Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . The press in its historic connotation comprehends information and opinion." . . . The information function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public.

³⁴436 U.S. 547.

³⁵See *Abrams*, note 5 supra, at 581-82 n. 112, citing Office of Media Liaison, White House Press Office, Carter Administration Stanford Daily Announcement 3-4 (Dec. 13, 1978). President Carter formally announced the proposed legislation in the House and the Senate April 2, 1979. See 125 CONG. Q. 2838 (Dec. 15, 1979). At least six states have already passed similar bills limiting the warranted searches of newsrooms, with proposals pending in at least 17 other states. See Newsroom-Search Decision Stirs State Actions, 1 PRESSTIME 30 (Nov. 1979). State bills, however, tend to define the press more narrowly. Under the new Illinois limitations, for example, warrants are not to be used "[w]hen the things to be seized are the work product of, or used in the ordinary course of business, and in the possession, custody, or control of any persons known to be engaged in the gathering or dissemination of news for the print or broadcast media." ILL. REV. STAT. ch 38, § 108-3(b) (emphasis added).

³⁶See, e.g., the Illinois Reporter's Privilege Act, which defines "reporter" to mean:

any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium; and includes any person who was a reporter at the time the information sought was procured or obtained.

A "news medium" in Illinois is defined as:

any newspaper or other periodical issued at regular intervals and having a paid general circulation; a news service; a radio station; a television station; a community antenna television service; and, any person or corporation engaged in the making of news reels or other motion picture news for public showing.

ILL. REV. STAT. ch. 51, § 112 (1979). Clearly the Illinois shield applies only to those engaged in communication on the established, institutional media.

³⁷See Abrams, note 5 supra, at 582-83.

³⁸Abrams, note 5 supra, at 583, draws a similar conclusion.

³⁹Sack, note 5 supra, at 633, citing First Nat'l Bank v. Bellotti, 435 U.S. at 781; Cox Broadcasting Corp. v. Cohn, 420 U.S. at 491-92; Lovell v. City of Griffin, 303 U.S. at 452.

⁴⁰New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring). Justice Black's concurrence was quoted with approval by the Court's majority in Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations, 413 U.S. 376, 381-82 (1973).

⁴¹See, e.g., Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 124-25 (1973), where the Chief Justice wrote:

For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors--newspaper or broadcast--can and do abuse this power is beyond doubt, but . . . [c]alculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility--and civility--on the part of those who exercise the guaranteed freedoms of expression.

See also, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974); Houchins v. KQED, Inc., 438 U.S. at 13-14.

⁴²See, e.g., Estes v. Texas, 381 U.S. 532, 539 (1965) (recognition of the press' special function to serve as a "mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees"); Mills v. Alabama, 384 U.S. 214, 219 (1966) (press found to function as a "powerful antidote to any abuses of power by governmental officials"); Shepard v. Maxwell, 384 U.S. 333, 350 (1966) (acknowledged a press function to guard "against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism").

⁴³See text accompanying notes 6-13 supra.

⁴⁴418 U.S. 323.

⁴⁵See text accompanying notes 1-3 supra.

⁴⁶This approach is consistent with Justice Stewart's Yale Law School address in which he argued that journalists, like public

officials within the three governmental branches, are virtually immune from libel and slander suits for statements they make in the line of duty. "By contrast," he noted, "The Court has never suggested that the constitutional right of free speech gives an individual any immunity from liability for either libel or slander." Stewart, note 4 supra, at 635.

⁴⁷Id. at 353 (Blackmun, J., concurring).

⁴⁸Id. at 354-55 (Burger, C.J., dissenting).

⁴⁹Id. at 392 (White, J., dissenting).

⁵⁰Nimmer, note 5 supra, at 649.

⁵¹Id. at 649.

⁵²Sack, note 5 supra, at 646.

⁵³376 U.S. at 271-72.

⁵⁴Id. at 270.

⁵⁵Id. at 278, 280.

⁵⁶Id. at 271.

⁵⁷Justice Brennan, for example, wrote that:

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions--and to do so on pain of libel judgments virtually unlimited in amount--leads to a comparable "self-censorship."

Id. at 279 (emphasis added). For other references to the citizen as critic, see Sullivan at 283, 292.

⁵⁸379 U.S. 64 (1964) (where defendant in a criminal libel case was a district attorney).

⁵⁹390 U.S. 727 (1968) (where defendant was a candidate for public office).

⁶⁰391 U.S. 563 (1968) (where defendant was a public school teacher).

⁶¹424 U.S. 448 (1976).

⁶²99 S.Ct. 2701 (1979).

⁶³99 S.Ct. 2657 (1979).

⁶⁴Id. at 2687 n. 16. The note also states that, in the view of the Chief Justice, the Court had never ruled on the question of

whether or not the Sullivan libel defense should be applied to non-media defendants.

⁶⁵Calero v. Del Chemical Corp., 228 N.W.2d 737, 745 (Wis. 1975).

⁶⁶See, e.g., Roemer v. Retail Credit Co., 119 Cal. Rptr. 82, 85-87 (Cal. App. 1975); Retail Credit Co. v. Russell, 218 S.E.2d 54, 56-57 (Ga. 1975).

⁶⁷Harley-Davidson Motorsports, Inc. v. Markley, 568 P.2d 1359, 1362-65 (Or. 1977). But a non-media defendant in Oregon may claim the privilege in an action brought by a public figure. Wheeler v. Green, 593 P.2d 777, 784-85 (Or. 1979).

⁶⁸Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E.2d 569, 571 (N.Y. 1975).

⁶⁹See, e.g., Cahill v. Hawaiian Paradise Park Corp., 543 P.2d 1356, 1363-66 (Haw. 1975); Gobin v. Globe Publishing Co., 531 P.2d 76, 84 (Kan. 1975); Martin v. Griffin Television, Inc., 549 P.2d 85, 90 (Okla. 1976); Foster v. Laredo Newspapers, Inc., 546 S.W.2d 809, 819-20 (Tex. 1976); Newspaper Publishing Corp. v. Burke, 224 S.E.2d 132, 136 (Va. 1976).

⁷⁰See, e.g., Fopay v. Noveroske, 334 N.E.2d 79, 88 (Ill. App. 1975); Roegelien Provision Co. v. Mayen, 566 S.W.2d 1, 11 (Tex. App. 1978).

⁷¹See, e.g., Davis v. Schuchat, 510 F.2d 731, 734 n. 3 (D.C. Cir. 1975); Maheu v. Hughes Tool Co., 569 F.2d 459, 479-80 (9th Cir. 1978); Church of Scientology v. Cazares, 455 F. Supp. 420, 423 (M.D. Fla. 1978); Chuy v. Philadelphia Eagles Football Club, 431 F. Supp. 254, 265 n. 20 (E.D. Pa. 1977); Bryan v. Brown, 339 S.2d 577, 583-84 (Ala. 1976), cert. denied, 431 U.S. 954 (1977); Sewell v. Brookbank, 581 P.2d 267, 271 (Ariz. App. 1978); Vegod Corp. v. American Broadcasting Co., 151 Cal. Rptr. 575, 580 (Cal. App. 1979); Rowe v. Metz, 564 P.2d 425, 426 (Colo. App. 1977), rev'd, 579 P.2d 83, 84 (Colo. 1977); Williams v. Trust Co. of Georgia, 230 S.E.2d 45, 48 (Ga. App. 1976); Troman v. Wood, 340 N.E.2d 292, 299 (Ill. 1975); Michaud v. Inhabitants of Town of Livermore Falls, 381 A.2d 1110, 1113 (Me. 1978); Jacron Sales Co. v. Sindorf, 350 A.2d 688, 695 (Md. App. 1976); Rogozinski v. Airstream by Angell, 377 A.2d 807, 814 (N.J. 1977); Hirman v. Rogers, 257 N.W.2d 563, 566 (Minn. 1977); Scott v. McCain, 250 S.E.2d 118, 120 (S.C. 1978); Artic Co. v. Loudoun Times Mirror, 4 Med. L. Rptr. 1947, 1950 (E.D. Va. 1978); Martonik v. Durkan, 596 P.2d 1054, 1057 (Wash. App. 1979).

⁷²In Bryan v. Brown, 339 So.2d at 583-84, for example, the Alabama Supreme Court noted that:

Although Gertz was a libel action brought by a private individual against a "publisher" in the narrow sense, nevertheless, the holding of that case, so directly involving the

breadth of the first amendment to the United States Constitution, is applicable to the facts of the instant case insofar as it affects the right of our state to award damages in defamation actions.

⁷³The Maryland Court of Appeals, in applying the Sullivan rule to both media and non-media defendants, said:

Nor do we discern any persuasive basis for distinguishing media and non-media cases. The rationale for the application of a constitutional privilege in New York Times, Curtis and Gertz is that the defense of truth is not alone sufficient to assure free and open discussion of important issues. Issues of public interest may equally be discussed in media and non-media contexts, and the need for a constitutional privilege, therefore, obtains in either case.

Jacron Sales Co. v. Sindorf, 350 A.2d at 694. The Maryland court also ruled that the privilege applied to both libel and slander, unifying defamation into a single tort. Id. at 694.

⁷⁴See, e.g., Lange, note 5 supra, at 82-84; Walterscheid, With Malice Toward One, 4 N. MEX. L. REV. 37, 46-47 (1973).

⁷⁵See, e.g., Collins & Drushal, The Reaction of the State Courts to Gertz v. Robert Welch, Inc., 28 CASE WESTERN L. REV. 306, 334 (1978). The Restatement of Torts also takes note of this problem. One comment explains that:

It would seem strange to hold that the press, composed of professionals and causing much greater damage because of the wider distribution of the communication, can constitutionally be held liable only for negligence, but that a private person, engaged in a casual private conversation with a single person, can be held liable at his peril if the statement turns out to be false, without any regard to his lack of fault.

RESTATEMENT (SECOND) OF TORTS § 580B, Comment e (1977).

⁷⁶For a discussion of this and other aspects of the question, why non-media defendants should not be privileged, see J. Barron & C. Dienes, HANDBOOK OF FREE SPEECH AND FREE PRESS 317-19 (1979).

⁷⁷441 U.S. 153.

⁷⁸Id. at 155-56.

⁷⁹For a discussion of this question as posed in Herbert, see Bezanson, Herbert v. Lando, Editorial Judgment, and Freedom of the Press: An Essay, 1978 UNIV. ILL. L. FORUM 605; Franklin, Reflections on Herbert v. Lando, 31 STAN. L. REV. 1035 (1979); Friedenthal, Herbert v. Lando: A Note on Discovery, 31 STAN. L. REV. 1059 (1979); Goldfluss, Herbert v. Lando: No Cause for Alarm, 1 COMM. & THE LAW 61 (1979); Hunter, Editorial Privilege and the Scope of Discovery in Sullivan-Rule Libel Actions, 67 KY. L.J. 789 (1978-79).

⁸⁰73 F.R.D. 387, 394 (S.D.N.Y. 1977).

⁸¹FED. R. CIV. P. 26(b)(1).

⁸²568 F.2d 974, 975 (2d Cir. 1977).

⁸³418 U.S. 241 (1974).

⁸⁴412 U.S. 94 (1973).

⁸⁵568 F.2d at 980.

⁸⁶Id. at 986 (Oakes, J., concurring). Judge Oakes noted what he termed an "evolving recognition of the special status of the press in our governmental system and the concomitant special recognition of the Free Press clause of the First Amendment" in such Supreme Court decisions as Tornillo and Democratic National Committee. Id. at 986-87. See also, Oakes, Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma, 7 HOFSTRA L. REV. 655, 720 (1979).

⁸⁷The questions which Lando refused to answer on the basis that they were inconsistent with the protection afforded the editorial process by the first amendment were grouped in five categories by the Second Circuit as follows:

1. Lando's conclusion during his research and investigations regarding people or leads to be pursued, or not to be pursued, in connection with the "60 Minutes" segment and the Atlantic Monthly article;
2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed;
3. The basis for conclusions where Lando testified that he did reach a conclusion concerning the veracity of persons, information or events;
4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and
5. Lando's intentions as manifested by his decision to include or exclude certain material.

568 F.2d at 983. It should be pointed out that four of the above categories involved Lando's state of mind alone while only the fourth involved "predecisional communications" with others. See, Franklin, note 79 supra, at 1036.

⁸⁸441 U.S. at 169-70.

⁸⁹Id. at 170.

⁹⁰Id. at 171-72.

⁹¹Id. at 176-77.

⁹²Id. at 180-81 (Brannan, J., dissenting in part).

⁹³Id. at 207-09 (Marshall, J., dissenting).

⁹⁴Id. at 199-202 (Stewart, J., dissenting). Justice Stewart wrote:

What was not published has nothing to do with the case. And liability ultimately depends upon the publisher's state of knowledge of the falsity of what was published, not at all upon his motivation in publishing it--not at all, in other words, upon actual malice as those words are ordinarily understood.

Id. at 200.

This statement caused one commentator to view Justice Stewart's position as being "simply wrong." It was pointed out that if what was not published contradicts what was published, and the communicator had knowledge of or ready access to the contradictory material, such evidence would be directly probative of actual malice or reckless disregard. See Hunter, note 5 supra, at 808.

⁹⁵Justice Powell's Herbert concurrence can be viewed as strongly reminiscent of his earlier concurrences for nearly identical majorities in two criminal discovery cases, Zurcher v. The Stanford Daily, 436 U.S. at 568 (Powell, J., concurring); Branzburg v. Hayes, 408 U.S. at 709 (Powell, J., concurring). For a discussion of Justice Powell's role in attempting to illuminate and integrate the opinions of other justices, see Goodale, News Media and the Law, in COMMUNICATIONS LAW 1978, at 425-27 (J. Goodale, ed., 1979); The Supreme Court 1978 Term, 93 HARV. L. REV. 148, 154 n. 45 (1979).

⁹⁶Id. at 178 (Powell, J., concurring).

⁹⁷Id. at 179-80 (Powell, J., concurring).

⁹⁸Id. at 180 (Powell, J., concurring).

⁹⁹See, e.g., The Supreme Court 1978 Term, note 95 supra, at 160-61.

¹⁰⁰Justice White dismissed Justice Brennan's suggestion that a qualified rule be fashioned granting editors' and reporters' "[i]deas expressed in conversations, memoranda, handwritten notes and the like" presumptive protection against discovery as contemplating either a lengthy bifurcated trial or a formalistic verification of the pleadings. 441 U.S. at 174-75 n. 23.

¹⁰¹Id. at 174.

¹⁰²Id. at 177-78 (Powell, J., concurring).

¹⁰³Justice Brennan, attempting to explain the criticism six months after the decision was announced, noted that:

Being asked about one's state of mind can be a demeaning and unpleasant experience. Nevertheless, the inquiry into a defendant's state of mind, into his intent, is one of the most common procedures in the law. . . . And, in the area of libel, it would scarcely be fair to say that a plaintiff can only recover if he establishes intentional falsehood and at the same time to say that he cannot inquire into defendant's intentions.

Address, Justice Brennan, Newhouse Law Center, New York, 5 Med. L. Rptr. 1841 (Oct. 17, 1979). For an analysis of why Herbert (characterized as "a thoroughly unremarkable case," the outcome of which, rightly or wrongly, could be said to flow from earlier Court decisions) evoked such a shrill response in early television and newspaper reports, see Franklin, note 79 supra, at 1049-58.

¹⁰⁴The sheer volume of the deposition transcript in Herbert gives some indication of the exhaustive questioning which the journalist may face in the discovery process. A total of 26 days, spread over the period of a year, was devoted to the deposition of Lando alone, consuming 2,903 pages of transcript, as well as 240 exhibits. Lando answered innumerable questions about what he knew, or had seen; whom he interviewed; intimate details of his discussions with sources; and the form and frequency of those interviews. The Second Circuit called the sheer volume of the transcript as "staggering." 568 F.2d at 982. Lando refused, however, to answer questions involving his beliefs, opinions, intent, and conclusions. Such questions ranged from inquiries into conclusions regarding people or leads to be pursued (or not to be pursued) to questions inquiring into Lando's intentions as manifested by decisions to include or exclude material. Brief of Respondents in Opposition, at 3-4. The questions which Lando refused to answer were grouped into five categories by the Second Circuit. See note 87 supra.

¹⁰⁵Rather than treating the issue raised as one of first impression, as had the District Court, 73 F.R.D. at 390, the Supreme Court's majority concluded that constitutional and common law precedent had already considered and rejected an editorial process privilege. See 441 U.S. at 160-65 and nn. 5-15. None of the cases cited by the majority expressly disproved the existence of an editorial process privilege. The pre-Sullivan cases listed demonstrate only that state of mind evidence is admissible to prove the defendant's common law malice. For a discussion of this problem, see The Supreme Court, 1978 Term, note 95 supra, at 153-54 n. 43.

¹⁰⁶This may occur in at least two ways: It may encourage more libel actions by plaintiffs who see a better chance of winning or who view the discovery proceedings as an opportunity to harass the

press, and it may discourage the frequent use made in the past of summary judgment for media defendants, at least until after the discovery process. Id. at 156-57. Encouragement for trial judges to deny summary judgment may have been reinforced, at least through dictum, in another libel action decided by the Court during its 1978 Term. Chief Justice Burger, writing for the Court in *Hutchinson v. Proxmire*, 99 S.Ct. 2657, appended a footnote to his opinion to make the observation that "[t]he proof of 'actual malice' calls a defendant's state of mind into question . . . and does not readily lend itself to summary disposition." Id. at 2680 n.9.

¹⁰⁷Besides the five opinions by Supreme Court justices, as noted above, Judges Kaufman, Oakes, and Meskill of the Second Circuit wrote separate opinions, see 568 F.2d at 975, 984, 995, and the trial judge, Judge Haight, also published an opinion. 73 F.R.D. 387.

¹⁰⁸Brief of Respondents in Opposition, at 67-68.